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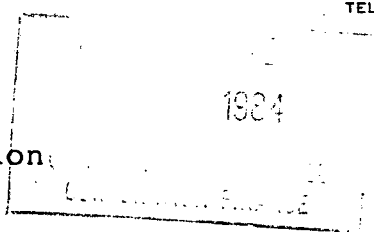
September 4, 1984

William E. Morley, Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549



Re: Applicability of Securities Act of 1933 to Foreign Resales of Securities Issued to U.S. Citizens in Connection with Certain Acquisitions

Dear Mr. Morley:

I am writing at your suggestion to assist you and your staff in addressing the issues which we discussed in general terms during our recent telephone conversation.

With the increasing internationalization of the world's capital markets and expanding U.S. operations of multinational foreign corporations, foreign private issuers having a class of securities listed and publicly traded on a foreign securities exchange (*e.g.*, The Stock Exchange in London) may wish to acquire domestic (U.S.) businesses in exchange for securities of the foreign private issuer in transactions intended to qualify under the Internal Revenue Code as reorganizations in which no gain or loss is recognized. The ability of foreign issuers to achieve the desired tax objectives has recently been enhanced by legislation which, effective January 1, 1985, will eliminate the necessity for obtaining a ruling from the Internal Revenue Service as a condition precedent to non-recognition treatment. Securities of the foreign issuer could be issued directly to the U.S. shareholders of the acquired U.S. company in exchange for their shares of the acquired company, or upon conversion of their shares in a merger of the acquired company with a U.S. subsidiary of the foreign issuer or upon the liquidation of the acquired company incident to the sale

of its assets to the foreign issuer or a domestic subsidiary thereof. At present, we have two foreign clients who are contemplating acquisitions of this character.

Under applicable foreign law and practice, securities of the foreign issuer so issued in such a transaction ordinarily could be freely resold by the holder in the relevant foreign market without registration under a foreign counterpart to the Securities Act of 1933 (the "Act") and without any prescribed holding period prior to such resale. In some cases, securities of the same class as those to be issued might be represented at the time of the transaction by American Depositary Shares evidenced by American Depositary Receipts ("ADRs") as to which there is an established market in the United States.

Where the U.S. company to be so acquired is privately-held by a limited number of U.S. citizens and residents (e.g., the members of a family actively engaged in the management and operations of the acquired company), the transaction ordinarily would be structured so as to be exempt from the registration requirements of the Act pursuant to Section 4(2) thereof. The shareholders of the acquired company would covenant not to sell or otherwise dispose of the securities of the issuer received by them except pursuant to an applicable exemption from the registration requirements of the Act or under cover of an effective registration statement. Assuming the existence of an applicable U.S. market for ADRs representing such securities, for practical purposes such shareholders ordinarily would seek to rely on the provisions of Rule 144 commencing two years following their acquisition of the foreign securities to effect resales of the ADRs within the U.S. market.

Where applicable foreign law and practice would permit resales of the acquired foreign securities within the established foreign market without the prior passage of any prescribed holding period, a question arises as to whether resales by the U.S. holder to and within such foreign market, if made sooner than the expiration of the two-year holding period required for domestic resales under Rule 144, would compromise the exemption afforded to the issuer under Section 4(2) of the Act with respect to the initial issuance of the securities to such U.S. holder. Since the availability of the foreign market is an integral element in the structuring of any such transaction, resolution of this question is necessary in order to facilitate such structuring.

It is our view that such resales by the U.S. holder in the established foreign market for such securities should not be deemed to fall within the jurisdiction of the Act and, therefore, should not be deemed to adversely affect the availability of the exemption afforded by Section 4(2) of the Act with respect to the original issuance of such securities to such U.S. holder if it reasonably can be established that such resales will be made in such manner and limited to such volume as will not result in or be deemed part of a distribution within the United States market.

It is clear that the focus of the Act, as well as the Securities Exchange Act of 1934, was at the time of enactment and has continued to be the protection of U.S. investors and the establishment and enhancement of order and fairness in the securities markets in the United States. The jurisdictional bases upon which the two statutes are predicated, as well as the body of rules, regulations and interpretations promulgated by the Commission thereunder, presuppose identification of the securities markets in the United States as discrete from those abroad. Although internationalization of the capital markets has been a recent and rapidly growing development, active direct participation in foreign markets as well as arbitrage between the domestic and foreign markets, has been primarily the province of large and sophisticated financial institutions - enterprises generally viewed as requiring less regulatory protection. Thus, both the jurisdictional underpinnings of the Act and the regulatory scheme which has been established by the Commission preclude identification of the world's securities markets as a single market for regulatory purposes.

Indeed, extraterritorial application of the Federal securities laws by the courts has been generally limited to extension of the reach of the antifraud provisions to embrace transnational fraud. Although the extent of such extraterritorial application has been the subject of extensive critical comment, virtually all such extensions nevertheless have had as their underlying premise the perceived need to protect the U.S. investor and the integrity of the U.S. securities markets.

Resales of securities of a foreign issuer in the issuer's "home" market, even when made by a U.S. citizen-resident who acquired the securities directly from the issuer in a transaction exempt from the requirements of the Act pursuant to Section 4(2) thereof, cannot be deemed *per se* to have any impact upon U.S. investors or upon the U.S. securities markets. Such an impact could arise only if the

foreign resale was merely a transitory step in a circuitous process intended to effectuate, or which reasonably could be foreseen inevitably to result in, the direct recycling of those securities to U.S. investors or within the U.S. market. If, on the other hand, a reasonable basis could be established for concluding that the resale abroad was not a mere step in a process of distribution to U.S. investors or the U.S. market, there would appear to be neither a jurisdictional basis for, nor any practical purpose to be served by, preclusion of the foreign resale.

In Securities Act Release No. 4708 (July 9, 1964), the Commission declared that the registration requirements of the Act would be inapplicable to an offering of securities outside the jurisdictional boundaries of the United States, even if made by a domestic issuer or seller, if the securities are distributed "in a manner which will result in the securities coming to rest abroad." We recognize that the Staff has generally declined to confirm precisely when, as a factual matter, securities may be deemed to have come to rest abroad or to establish objective criteria for restrictions deemed adequate to assure this result. However, a practice has evolved, particularly in the context of foreign offerings of securities by foreign affiliates of U.S. issuers, under which (i) the initial placement of the securities is limited to persons who are not "U.S. Persons," i.e., citizens or residents of, or institutions organized under the laws of, the United States, (ii) the purchasers agree that they will not knowingly resell to U.S. Persons or sell or offer the securities for sale within the United States, (iii) all of the principal elements of the offering occur outside the United States and (iv) restrictions are placed on any transfer of the securities for a defined period (usually ninety days). While none of these limitations, individually or in the aggregate, has been deemed dispositive, they have been viewed as acceptable by most knowledgeable securities practitioners.

We believe that analogous limitations might be applied to transactions of the character described herein so that foreign resales by a U.S. holder of securities of a foreign issuer which would be deemed "restricted securities" in the United States are conducted in a manner which will not result in a distribution of such securities within the purview of the Act and, therefore, would not preclude the availability to the issuer of an exemption under Section 4(2) with respect to the initial issuance of the securities to such U.S. holder. Specifically, we would propose imposition of the following limitations:

(i) The securities to be issued to the U.S. holder would be delivered abroad to a bank or other institution designated as agent for such U.S. holder.

(ii) A prohibition would be imposed upon any resale of the securities by the agent for the account of the U.S. holder for a specified minimum period. At present, we are considering a period of ninety days.

(iii) The arrangements would contemplate that, following the initial minimum "lock-up" period, the securities would continue to be held by the agent outside the U.S. for the U.S. holder's account until the expiration of the two-year holding period prescribed by Rule 144 as a precondition to domestic resales, unless sooner delivered to the U.S. holder in the United States in the form of ADRs for the purposes of resale therein under cover of an effective registration statement or pursuant to an applicable exemption from the provisions of Section 5 of the Act as to which counsel acceptable to the issuer had favorably opined in writing. ADR's so delivered would be appropriately legended to prevent transfer thereof except upon instructions from the issuer and its counsel that such transfer complied with or was exempt from the registration requirements of Section 5 of the Act.

(iv) Subsequent to the initial minimum "lock-up" period, the agent would be permitted to resell such securities solely within the relevant foreign market, provided that such resales were not knowingly made to U.S. Persons and were made either in private vendor placings or in ordinary brokerage transactions on the applicable foreign securities exchange and in quantities and under circumstances that would not disturb the normal trading volume of such market or lead to a likelihood of "spill-over" to the United States market. We do not presently believe that it is necessary to impose on such foreign resales an arbitrary percentage-of-trading-volume limitation equiv-

alent to that imposed by Rule 144 for domestic resales of restricted securities, since the nature of foreign securities markets and the methods of effecting transactions therein are in many cases different from those applicable to the U.S. market.

We believe that the issues presented by this letter are novel and, in light of developing trends in transnational corporate transactions, justify interpretative guidance by the Staff. I would be pleased to meet with you and your colleagues to discuss these issues in greater detail. Please don't hesitate to call me at (212) 310-8200 or my partner, Stephen H. Cooper, at (212) 310-8202.

Sincerely

Robert Todd Lang

RTL:wpc
cc: Carl T. Bodolus, Chief
Office of International
Corporate Finance

14A-8

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

September 19, 1984

James H. Doyle, Reporter
The Washington Times
3600 New York Avenue, N.E.
Washington, D.C. 20002

Dear Mr. Doyle:

Chairman Shad thought you might be interested in the following information on the Commission's shareholder proposal rule, in view of the Letter to the Editor from Carl Olsen which appeared in the August 27, 1984 edition of The Washington Times.

The Commission believes that it is necessary and appropriate for shareholders of public companies to have an effective means for communicating with their fellow shareholders. In the Commission's view, such a procedure acts as a safety valve, providing shareholders with a means to express their views on corporate issues. Since 1942, the Commission has provided security holders of public companies subject to the proxy rules a right to have their proposals presented to an issuer's security holders at large and to have proxies with respect to such proposals solicited at little or no expense to the security holders. This right has been provided by the Commission shareholder proposal rule, Rule 14a-8 and its predecessors.

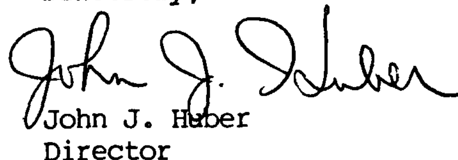
Since its adoption in 1942, the Commission's shareholder proposal rule has undergone a number of revisions designed to better define and refine the various procedural and substantive provisions of the rule and to assure the goal of effective shareholder communications. Each of these revisions assumed the desirability of continuing the basic regulatory framework reflected in Rule 14a-8.

The most recent revision of Rule 14a-8 was proposed in October 1982. At that time, the Commission requested public comment on three alternative approaches for the continued regulation of shareholder proposals. Two of those approaches would have significantly changed the regulatory approach to dealing with the shareholder proposal process. The third approach was intended to maintain the basic framework of existing Rule 14a-8 with some amendments designed to remove procedural provisions not required to further the purpose of the rule, to clarify and simplify application of the rule; to incorporate certain staff interpretations and practices employed in administering the rule; and to minimize opportunities for abuse of the shareholder proposal process.

In August 1983, the Commission adopted the revisions to Rule 14a-8 reflected in the third alternative which maintained the basic framework of the traditional approach to regulating shareholder proposals. The Commission acted after carefully considering the views of almost 400 commentators who responded to the Commission's request for comments on the proposed amendments. Those commentators including representatives from the corporate community as well as over 200 individual shareholders who are frequent users of the shareholder proposal process overwhelmingly endorsed the retention of the traditional approach.

The amended rule represents the Commission's view of the most equitable and effective means of safeguarding the right of the individual shareholder to present for shareholder action matters he deems important to shareholders at large. At the same time the new provisions are designed to provide for their right without imposing upon issuers and the other shareholders an added financial and administrative burden where the proponent has no measured interest in the issuer, or where the proposal is either inappropriate for shareholder action or not of interest to the shareholders as a group. The staff has carefully monitored operations of the amended rule in this first full year since its adoption, and will continue to do so as part of its ongoing evaluation of the proxy rules. For your information, I am enclosing a copy of both the proposing and adopting releases which amended the shareholder proposal rule.

Sincerely,



John J. Huber
Director

Enclosures